

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
LDDS COMMUNICATIONS, INC.,)	
)	
Complainant,)	
)	
v.)	File No. E-94-71
)	
UNITED TELEPHONE OF FLORIDA,)	
)	
)	
Defendant.)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: March 7, 2000

Released: March 8, 2000

By the Chief, Enforcement Bureau:

1. In this order, we dismiss for lack of jurisdiction a formal complaint filed by LDDS Communications, Inc., against United Telephone of Florida.¹ LDDS argues that United violated the applicable interstate tariff and Commission policy by retroactively adjusting LDDS's percentage of interstate use calculations and then backbilling LDDS for the concomitant increase in its liability for intrastate access services.² LDDS asserts that United's actions amount to unjust and unreasonable practices in violation of Section 201(b) of the Act, and it seeks damages in the amount by which United retroactively increased its liability for intrastate access service. United

¹ LDDS filed its complaint pursuant to Sections 206 through 209 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. §§ 206-209. During the pendency of this action, LDDS was acquired and changed its name to LDDS Worldcom. Complainant's Brief at 1.

² Complaint at 7. Complainant's Memorandum in Support of LDDS' Formal Complaint at 3 (Complainant's Memorandum In Support). PIU calculations are discussed in *In re Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service*, 4 FCC Rcd 8448, 8449 (1989), and *In re Bell South Telecommunications, Inc., Revisions to Tariff FCC No. 1*, 8 FCC Rcd 1403, 1403 n.1 (1993) ("Bell South").

has denied the allegations and has moved to dismiss the complaint, arguing, *inter alia*, that it falls outside of the jurisdiction of this Commission. For the reasons discussed below, we grant United's motion.

I. BACKGROUND

2. Complainant LDDS is an interexchange carrier (IXC) that purchased local access service in Florida, for both its interstate and intrastate traffic, from United, a local exchange carrier (LEC).³ The regulatory scheme that has developed under the Act and the Commission's regulations requires that transmissions that use access service be identified as either interstate or intrastate.⁴ Once assigned to the appropriate category, charges for the transmissions are separately regulated under the dual regulatory regime prescribed by the Act.⁵ Thus, the two categories of traffic are regulated along two separate but parallel tracks by independent agencies – the FCC for interstate communications and the appropriate state commission for intrastate communications.

3. Because of technical limitations, at least at the time relevant to this complaint, United was unable to distinguish between interstate and intrastate transmissions by IXCs for certain services. In order properly to bill for access service for the two categories of traffic, United therefore relied on the IXCs to compile percentage of interstate use (PIU) reports. These reports reflected the split of an IXC's traffic between the interstate and intrastate categories. These reports then allowed the LEC to charge the appropriate, tariffed rates for interstate and intrastate access service.⁶

³ Complaint at 1-2. The access services at issue here were actually purchased by Advanced Telecommunications Corporation ("ATC") and Tele-Fibernet Corporation ("TFN"), two IXCs that were subsequently acquired by LDDS. ATC merged with LDDS in December 1992, and TFN was acquired by LDDS in August 1992. *Id.* at 1. For purposes of this order, we treat LDDS as the entity that purchased the relevant services.

⁴ See, e.g., *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148-49 (1930) (requiring "separation of the intrastate and interstate property, revenues and expenses" of LECs); 47 C.F.R. §§ 69.2(b), 69.3(a) (in combination, requiring filing of interstate access tariffs at FCC).

⁵ See, e.g., 47 U.S.C. § 151 (assigning to FCC the regulation of "interstate and foreign commerce in communication by wire and radio"); *id.* § 152(b) (excluding from FCC jurisdiction matters relating to "intrastate communication service by wire or radio").

⁶ The Commission previously has recognized that LECs are not able accurately to measure interstate and intrastate usage of Feature Group A (FGA), Feature Group B (FGB), 700, 800, and 900 switched access services. See *Determination of Interstate and Intrastate Usage*, 4 FCC Rcd at 8448-49 (adopting *Joint Board Recommended Decision and Order*, 4 FCC Rcd 1966 (1989)). These orders addressed measurement and verification of interstate

4. During the period relevant to this complaint, the rates in Florida for intrastate access service were higher than the rates for interstate access.⁷ Accordingly, IXC's doing business in Florida had an incentive to overstate their percentage of interstate use, thereby reducing the fraction of their total traffic that was subject to the higher, intrastate access rates.

5. LDDS purchased interstate access service from United pursuant to United's FCC Tariff No. 5.⁸ United's interstate tariff specifically refers to "back-billing." The interstate tariff requires IXC's to file quarterly updates of their PIU reports and states: "The revised report will serve as the basis for the next three months billing and will be effective on the bill date for that service. No prorating or back billing will be done based on the report."⁹ The tariff contains similar language in the section that requires an updated PIU report after an IXC has added new lines or trunks.¹⁰ Under the tariff, United also expressly reserves its right to inspect and audit the call detail records from which IXC's compile their PIU reports.¹¹ In contrast to the portion of the tariff dealing with quarterly updates to the PIU *report*, the tariff is silent on whether United may retroactively bill an IXC based on the results of such a PIU *audit*.

6. LDDS also purchased intrastate access service from United, under United's Florida Access Service Tariff.¹² Like United's interstate tariff, the Florida tariff requires quarterly jurisdictional reports from the IXC,¹³ and permits United to audit these reports.¹⁴ Unlike the federal tariff, however, the Florida tariff expressly permits back-billing for up to one year if the PIU audit indicates that the IXC has underreported its intrastate usage:

If the percentage data thus provided shows that the reported intrastate

and intrastate usage of FGA and FGB services by IXC's for interstate and intrastate access charge billing and cost separation. *See also Bell South*, 8 FCC Rcd at 1403 n.1.

⁷ Florida Public Service Commission's Amicus Memorandum in Support of United's Position at 1.

⁸ Complaint at 2.

⁹ United Tariff FCC No. 5 § 2.3.14.(A)(7).

¹⁰ *See id.* § 2.3.14.(A)(6) ("The revised report will serve as the basis for future billing and will be effective on the next bill date. No prorating or back billing will be done based on the report.").

¹¹ *Id.* § 2.3.14(B).

¹² Complaint at 2; and Attachment 2 ("Florida Intrastate Tariff").

¹³ Florida Intrastate Tariff § E2.3.14(A)(7).

¹⁴ *Id.* § E2.3.14(B).

percentage was less than the audited percentage, the audited percentage shall be applied to the current month's usage and to all usage reported since a date 12 months earlier than the date on which the audit was completed Prorating and backbilling will be permitted on the basis of audited results for a period of 12 months¹⁵

7. Beginning in 1991, United audited the call detail records of ATC and TFN, the two carriers involved here that subsequently were acquired by LDDS.¹⁶ The audit of ATC's records took place in late 1991 and covered the carrier's PIU reports for the operating period from September 1990 through October 1991.¹⁷ This audit concluded that the carrier's reports during the audit period had substantially understated its intrastate minutes of use, resulting in an underpayment of \$2,452,908.38 for intrastate access service. Consistent with the above provision of the Florida tariff, United retroactively increased LDDS's percentage of intrastate use for the year covered by the audit. This increase in the number of intrastate minutes resulted in an equivalent, off-setting reduction in the carrier's minutes of interstate use for that same period, which, in turn, caused a retroactive reduction in the amount the carrier owed for interstate access for that same period. Netting out the underpayment for intrastate access and the overpayment for interstate access, United billed the carrier for an additional \$1,223,520.47 in access charges." After further negotiation, LDDS paid United, in December 1992, \$860,500.¹⁸

8. In 1992, United performed a similar audit of TFN, the other carrier that LDDS subsequently acquired. This audit covered the operating period from September 1991 to August 1992¹⁹ and also concluded that the carrier's PIU reports had understated its minutes of intrastate use. Adjusting for the underreporting of intrastate use resulted in an increase in the charge for intrastate access service of \$212,425.68. Here again, the retroactive increase in minutes of intrastate use resulted in a corresponding reduction in the amount due for interstate access service during the audit period. The net effect of this audit was to cause an increase of

¹⁵ *Id.*

¹⁶ *See supra* note 3.

¹⁷ Complaint at 5.

¹⁸ The parties disagree over whether this payment represented a settlement of the matter or was extracted by United under threat of service termination. *Compare* Initial Brief of United at 9 *and* Initial Brief of LDDS at 9-10.

¹⁹ Complaint at 6.

\$117,343.85 in the amount that the carrier owed for access service during the audit period. LDDS paid this amount in full in April 1993.²⁰

9. On July 7, 1994, LDDS filed this complaint asserting that it is entitled to recover, with pre-judgment interest, the amounts it paid United for the retroactive adjustments in access charges.²¹ LDDS's complaint alleges that United violated both its own interstate tariff and Commission policy by adjusting LDDS's percentage of interstate use after the fact and by retroactively billing for the resultant net increase in charges for intrastate access. Specifically, LDDS contends that the silence of United's federal tariff on the issues of retroactive PIU adjustment and back-billing should be construed to prohibit United's actions in this case. United responds that its retroactive adjustments to LDDS's access-charge liability were accomplished pursuant to the terms of the intrastate tariff and that they were therefore consistent with the governing tariffs and with Commission policy. By way of affirmative defense, United argues that this complaint focuses on calculations performed under the intrastate tariff and therefore falls outside of the Commission's jurisdiction.²²

II. DISCUSSION

10. LDDS argues that the back-billing of which it complains constituted a single, unified transaction to which the Commission's jurisdiction necessarily attaches in light of the involvement of United's federal tariff. In an apparent effort to avoid the fact that the retroactive billing involved calculations under both the Florida and the federal tariffs, LDDS contends that it is actually the retroactive adjustment of the PIU figure of which it complains. Thus LDDS contends that, given the reciprocal relationship between interstate and intrastate minutes of use, "any change to the intrastate PIU automatically affects change to the interstate PIU."²³ It contends that, regardless of the terms of the intrastate tariff on the question, the interstate tariff prohibits back-billing.²⁴ To effectuate this prohibition fully, LDDS then asserts, it must be extended to prohibit the retroactive adjustments to intrastate minutes of use that United accomplished in this case.

²⁰ *Id.*

²¹ *Id.* at 7.

²² See Answer at 6. Additionally, United alleges that LDDS's partial payment of the bill for ATC's access charges represents an accord and satisfaction, which bars LDDS's claims relating to that charge. See *id.*

²³ See Initial Brief of LDDS at 8.

²⁴ We express no opinion on, and our decision in this matter should not be construed to address, the issue of whether the interstate tariff would allow a retroactive increase in a carrier's interstate access liability.

11. The difficulty with LDDS's argument is that it conflates what were actually separate (albeit related) transactions, which were independently subject to the restrictions in two separate tariffs. The relationship between interstate and intrastate minutes of use does not subject to federal law, and the terms of the interstate tariff, all changes in a carriers' minutes of intrastate use. Rather, the traffic measurements process identifies the jurisdiction to which an IXC's traffic is assigned. Once that assignment has been accomplished, it is the appropriate tariff, as construed and applied by the proper regulatory authority, that governs the process of charging for minutes of use. In light of this regulatory structure, LDDS's complaint is properly viewed as challenging the two separate calculations – performed under two different tariffs – that resulted in United's retroactive adjustment of the access-charge liability.

12. The first transaction is the reduction of the carriers' interstate access-charge liability. To the extent that LDDS challenges this transaction, it challenges an access-charge calculation made under a tariff filed with the FCC and over which the Commission certainly has jurisdiction.²⁵ On the other hand, the second transaction is plainly outside of the Commission's jurisdiction. In calculating the new intrastate access charges, United applied the terms of its intrastate tariff to the revised figure for intrastate minutes of use. Under the Act's dual-track system, this transaction falls squarely within the jurisdiction of the Florida PSC; as such, it is beyond the jurisdiction of the Commission.

13. This raises the question of which of these two related, but separate, transactions it is that LDDS challenges in this action. There can be little question that the focus of LDDS's claim is on the calculation of its liability for intrastate access service. LDDS does not challenge the *credit* it received in connection with the recalculation of its interstate access bill. Rather, it objects to the retroactive *increase in liability* for intrastate access.²⁶ As noted above, this is a matter governed by United's Florida tariff and one over which the Florida PSC, not this Commission, has jurisdiction. Although this Commission unquestionably would have the authority to decide issues arising under United's federal tariff, we conclude that LDDS's complaint, fairly read, presents no such issues. The Act creates clear jurisdictional lines which we are bound to observe.²⁷ Given these restrictions on our authority, the relationship between percentage of interstate and intrastate use provides an insufficient basis for us to exercise jurisdiction over the retroactive adjustment of LDDS's intrastate access charge liability.

²⁵ See, e.g., 47 U.S.C. §§ 151, 201, 203 (giving Commission authority to regulate interstate communications).

²⁶ We note that, at one point, LDDS questions in passing United's authority retroactively to revise the interstate access charges. See, e.g., Initial Brief of LDDS at 5. However, the gravamen of LDDS's claims in this action clearly is the recalculation, under the Florida tariff, of the intrastate access liability.

²⁷ See note 5 *supra*; see also note 4 *supra*.

III. CONCLUSION AND ORDERING CLAUSES

14. We conclude that we have no jurisdiction over this matter because the gravamen of LDDS's complaint, the retroactive adjustment of its intrastate access charges, presents an issue falling solely within the jurisdiction of the Florida Public Service Commission. Because we dismiss this matter for lack of jurisdiction, we do not address the parties' other arguments in this case.

15. Accordingly, IT IS ORDERED, pursuant to sections 1, 2(b), 201 and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(b), 201, 208, and the authority delegated in Sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the above-captioned complaint filed by LDDS Communications, Inc., IS DISMISSED FOR LACK OF JURISDICTION.

16. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau